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No. 959.

In the Supreme Court of the United States

October Term, 1964.

BUILDERS ASSOCIATION OF KANSAS CITY, *Petitioner*,

vs.

GREATER KANSAS CITY LABORERS DISTRICT COUNCIL OF THE INTERNATIONAL HOD CARRIERS, BUILDING, AND COMMON LABORERS UNION OF AMERICA OF GREATER KANSAS CITY AND VICINITY, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR GREATER KANSAS CITY LABORERS DISTRICT COUNCIL OF THE INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA OF GREATER KANSAS CITY AND VICINITY.

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INDEX.

	PAGE
uestion	2
atement	3
easons for Denying Writ	5
onclusion	9

CITATIONS:

Atkinson v. Sinclair Refining Company, 370 U. S. 238 (1962)

Boston Printing Pressmen's Union v. Potter Press, D. C. Mass., 144 F. Supp. 553 (1956), Affirmed 241 F. 2d 787 (1957)

Brake Bakeries, Inc. v. Local American Bakery and Confectionery Workers International, 370 U. S. 254 (1962) 5

Mailers' Union v. Newspapers, Inc., Page
55 LRRM 2693 (March 13, 1964)

United Steel Workers v. American Manufacturing Co., 363 U. S. 564 (1960)

United Steel Workers v. Warrior & Gulf Navigation Company, 363 U. S. 574 (1960)

United Steel Workers of America v. Enterprise Wheel and Car Corp., 363 U. S. 593 (1960)

United States v. Livingston, U. S. , March 30, 1964)

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No. 969

QUESTIONS PRESENTED.

1. Whether the United States District Courts have equity jurisdiction or authority to grant specific performance of an arbitration clause in a collective bargaining agreement for the purpose of establishing a trust fund to receive and distribute monies contributed pursuant to such a fund for the purpose of carrying out a health and welfare program.

2. Whether in construing the intent of the parties respecting arbitrability, Federal courts may not follow a presumption of arbitrability because of the substance of the dispute to be arbitrated.

3. Whether a Federal court must anticipate an award which might be in violation of the law and, therefore, deny arbitration in anticipation of such an illegal result.

STATEMENT.

The statements of facts as set forth in the Petition are substantially correct and are recitations from a stipulation entered into by the parties (R. 7 through 14). The factual situation is perfectly clear. On June 16, 1960, the petitioner and the respondent entered into a collective bargaining agreement (R. 7-9). In that agreement it was agreed, among other things, that effective April 1, 1962, the employers would make contributions of ten cents (10c) per hour for all classifications into a Health and Welfare Insurance Program. This program was to be conducted pursuant to a "Trust Agreement to be agreed upon between the parties" (R. 33). The petitioner and the respondent were never able to agree upon such a trust agreement. The respondent took the position that the contributions should be made to a trust fund known as Construction Industry Laborers Welfare Fund. The petitioner took the position that a new trust fund should be set up for handling these particular contributions.

Negotiations began on this dispute in January of 1962 (R. 10-11). The respondent demanded that the dispute over the trust agreement be submitted to arbitration (R. 42, 43). The petitioner refused and has continued to refuse to submit this issue to arbitration.

The arbitration clause, which is Article IX of the Agreement, provides that:

> "There shall be no stoppage of work on account of any differences which may occur between a member or members of the Association and the Union. If this matter cannot be adjusted between the parties involved, it shall be taken up between a representative of the Union and a Representative of the Association

If then the matter cannot be settled satisfactorily, it shall be immediately referred to an Arbitration Board consisting of three members appointed by the Association and three members appointed by the Union. These six men shall have authority to choose a neutral third party who shall act as arbiter and the decision of the arbiter shall be final and binding upon both parties and must be in writing."

Respondent brought suit to compel the petitioner to arbitrate the dispute which had arisen between them. It requested the District Court to require the respondent to submit to arbitration this dispute. The Federal District Court on a motion for summary judgment gave the Respondent the relief requested (213 F. Supp. 429, 217 F. Supp. 14. The decision was appealed by the petitioner to the Eighth Circuit which rendered a decision adverse to them (326 F. 2d 867).

REASONS FOR DENYING THE WRIT.

1. The United States Supreme Court in a number of recent decisions has clearly expressed the view that under arbitration clauses as broad as the one involved here, the courts should, as a matter of course, enforce the arbitration clauses. *United Steel Workers of America v. American Manufacturing Company*, 363 U. S. 564; *United Steel Workers of America v. Warrior and Gulf Navigation Company*, 363 U. S. 574; *United Steel Workers of America v. Enterprise Wheel and Car Corp.*, 363 U. S. 593; *Drake Bakeries, Inc. v. Local 50 American Bakery and Confectionery Workers International*, 370 U. S. 254.

As stated by the Court of Appeals, the clear implications from these decisions not only "justified" but "required" the ruling of the District Court:

> The petitioner in his petition is relying almost entirely upon the decision of Judge Wyzanski in *Boston Printing Pressmen's Union v. Potter Press*, D. C. D. Mass. 141 F. Supp. 353 (1956), affirmed 241 F. 2d 787 (1957), cert. denied 355 U. S. 817. That decision which was written several years prior to the Steel Workers cases involved a question of whether or not an employer could be forced to arbitrate the terms and provisions of a new contract under an arbitration clause contained in an old agreement. At that time, Judge Wyzanski was seriously concerned with the Constitutionality of Section 301 of the Labor Management Relations Act, if it could be used to compel arbitration of all the terms and conditions of a new contract. At that time there was substantial doubt as to whether Section 301 of the Labor-Management Relations Act could be used to compel arbitration under any executory agreement. Since that time, the Supreme Court in

clearly indicated that a presumption exists in favor of arbitrability, particularly in the Warrior and Gulf case, *supra*, at Pages 581, 584, 585 of 363 U. S. 574, wherein it made the following statements:

> "Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must * * * come within the scope of the grievance and arbitration provisions of the collective agreement. The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement.
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> * * * * * * *
>
> * * * In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim for arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. * * *
>
> * * * * * * *
>
> "The judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict. * * *"

Petitioners will call to the Court's attention the most recent decision of the Fifth Circuit in *Mailers Union v. Newspaper, Inc.* ..... Fed. ..... 55 LRRM 2693 (March 13, 1964). The court in that case refused to enforce an arbitration clause which apparently required the parties to arbitrate the terms and conditions of a *new* agreement. The actual facts are not set forth in the appellate court and the District Court's decision is unreported. The opinion is brief and simply notes that it believes the Boston Printing case is still good law. It gives no explanation for its decision and refers to no case by the Supreme Court in support thereof.

It is respectfully submitted that the decisions of the United States Supreme Court cited above and the recent decision in the matter of *Wiley & Sons v. Livingston*, ... U. S. ..... (March 30, 1964), constitute a complete answer to the problem in the case at bar. The dispute in the immediate case cannot easily be described as one requiring a "legislative" rather than a "judicial" award any more than the disputes in the Livingston case can be broken down into "procedural" or "substantive" aspects.

It must be remembered that the dispute in the immediate case does not require the arbitrator to determine whether or not the employers should make health and welfare payments but relates only as to the *methods* of passing benefits to the employees. As this Court has already clearly indicated it is unrealistic to attempt to put a label on a dispute and then declare that it is arbitrable or not arbitrable, based on the label given to the dispute. *John Wiley & Sons v. Livingston, supra.* Since this Court in the above decided cases has clearly answered the legal questions involved, no sound reason exists for the granting of certiorari.

2. The second issue presented by the petitioner does not truly involve a legal question sufficient under any circumstance to justify the issuance of a writ. Petitioner argues that the lower courts misconstrued the breadth of the arbitration clause. It actually is presenting an argument which is different from that presented in the lower court, to wit, that the contract clause did not apply to disputes between the petitioner and the respondent but only to disputes between *members* of the respondent and employees. Originally, they simply argued that this *dispute* was not subject to arbitration.

The arbitration clause quoted above speaks for itself. The petitioner cannot separate its identity from all of its members. Petitioners' reliance on *Atkinson* v. *Sinclair Refining Company*, 370 U. S. 238 is ill founded. The arbitration clause in that case did not even mention the employer. In the immediate case the representative of the Association is the sole employer party who can take matters to arbitration. In any event, the United States Supreme Court has answered the argument in the Livingston case cited above. The other cases cited by petitioner do not present facts which in any way compare to the immediate matter.

3. Petitioner argues that the lower courts erred in refusing to make a finding concerning the alleged illegality of an award which was desired by the respondent. This does not constitute grounds for granting the writ.

At this point no one knows who the arbitrator will be, what the exact positions of the parties will be, or what award will be made. It is elementary that a court should not make a declaratory judgment on a completely hypothetical set of facts. In addition this Court has repeatedly stated that the courts are not to inquire into the merits of the dispute. *John Wiley* v. *Livingston*, *supra*. The argument that the hopes and aspirations of respondent might be satisfied, through an allegedly unlawful award and therefore the issue of illegality should be presented to the court and decided by it, is untenable. This issue has been clearly covered by opinions of this Court.

Conclusion.

It is respectfully submitted that a writ of certiorari not be granted because there is no real conflict in the law on any question. The United States Supreme Court has in the past few years rendered numerous decisions, which, as the Circuit Court of Appeals has said, "not only justified but required" the entry of the judgment. It should be further noted that since the decision of the Circuit Court of Appeals the United States Supreme Court has rendered an additional opinion the Livingston case which provided for even greater "legislative" relief than is required here. No real question of law exists. Further, the case at bar does not present any important question respecting rules of construction for arbitration clauses in labor agreements that has not already been answered, and the question concerning the defense of alleged illegality of a future possible award is not worthy of review.

Respectfully submitted,

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